

**Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)	CC Docket 96-128
)	
Payphone Compensation)	

NTELOS Petition Request for Waiver of 47 CFR §64.1301

NTELOS Inc. is the holding company for its two Incumbent Telephone Exchange Companies (“ILECs”): NTELOS Telephone Inc. (“NTELOS”) and Roanoke & Botetourt Telephone Company (“R&B”). Pursuant to Section 1.3 of the Federal Communication’s (“FCC” or “Commission”) Rules¹, hereby requests a waiver of Sections 64.1301(a), 64.1301(d) and 64.1301(e) of the Commission’s Rules² to exclude NTELOS and R&B from the requirement to pay default compensation to payphone service providers. Because NTELOS and R&B are ILECs, NTELOS and R&B are included among the universal group of ILECs subject to Section 64.1301 by inclusion of “ILEC” on Appendices A, B and C of the Commission’s *Fifth Reconsideration Order* in CC Docket No. 96-128³, NTELOS and R&B are subject to the requirement to pay default compensation to payphone providers for compensable calls. Because NTELOS and R&B does not carry compensable calls, NTELOS and R&B respectfully requests that the Commission waive the requirement under Sections 64.1301(a), 64.1301(d) and 64.1301(e) of the Commission’s Rules for NTELOS and R&B to make default payments to payphone service providers.

NTELOS and R&B are incumbent local exchange carriers (ILECs) serving approximately 38,000 customers and 11,000 respectively in the state of Virginia. On August 29, 2003, NTELOS received a letter and invoice from APCC. Said letter indicates “This memorandum, combined with the enclosed invoice containing information on the PSPs represented by APCC Services and the PSP ANIs for which they are seeking compensation or true-up, serves as a billing invoice for your company’s True-Up obligation to these PSPs for all the periods defined...”

1. A key determination by Commission regarding compensable calls is that an ILEC must carry a call in order to be responsible for payment.

The Fifth Reconsideration Order was intended to bring a “measure of finality” regarding the contentious history of payphone compensation. One purpose of the Commission’s

¹ 47 C.F.R. § 1.3.

² 47 C.F.R. §§ 64.1301(a), 64.1301(d) and 64.1301(e).

³ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, *Fifth Order on Reconsideration and Order on Remand*, FCC 02-292 (Rel. Oct. 23, 2002) (*Fifth Reconsideration Order*).

action was to ensure that payphone service providers (PSPs) receive fair compensation for every call made using their payphones. The Commission has concluded that Section 276 requires it to “ensure that per-call compensation is fair, which implies fairness to both sides.”⁴

In pursuit of this objective and a fundamental criterion to the Commission’s rules regarding payphone compensation was to ensure that local exchange carriers (“LECs”) “pay payphone compensation to the extent that they handle compensable payphone calls.”⁵ This is a threshold criterion that must be satisfied prior to placing a burden for PSP payment on any LEC. Absent satisfying this threshold criterion, a carrier would be responsible to pay for a compensable call that it did not handle. Clearly such result would not be a fair result for the LEC.

The Commission explained how a LEC can handle compensable communications.

- a. When a LEC terminates a compensable call that is both originated within its own service territory and not routed to another carrier for completion,
- b. When a LEC also provides interexchange service and carries the call as would any other IXC.

2. The Commission’s default payphone compensation regime for ILECs is based exclusively on RBOC data that does not reflect NTELOS’ lack of compensable calls.

Based on at least two data requests initiated by the Commission and directed solely to the RBOCs, the Commission determined that incumbent LECs complete payphone calls that are not routed to other carriers. The RBOC data apparently shows that 2.19 percent of all compensable payphone calls are handled by the RBOCs. The Commission also noted that no other incumbent LEC objected to this data. The Commission concluded that it is appropriate to allocate to “both RBOC and non-RBOC incumbent LECs a percentage of the calls (2.19%) originating from payphones within their own service territories.” NTELOS did not have cause to object to this data because clearly the Commission was directing its efforts at determining the percentage for “carriers” – those entities who carry compensable communications. As will be shown below, NTELOS does not carry any compensable calls. Thus the application of the allocation percentage in the case of NTELOS is inappropriate.

⁴ *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, FIFTH RECONSIDERATION ORDER ON RECONSIDERATION AND ORDER ON REMAND, 17 FCC Rcd 21274, FCC 02-292, CC Docket No. 96-128, October 23, 2002, (“*Fifth Reconsideration Order*”), at 82.

⁵ *Fifth Reconsideration Order*, at 55 (Emphasis supplied).

3. NTELOS never carries compensable calls.

A compensable call is defined by the Commission as a call from a payphone user who calls a toll-free number, dials an access code, or uses a pre-paid calling card without placing any money into the payphone.⁶ Because of its operation as an access provider, NTELOS does not carry any compensable communications. NTELOS does carry limited intraLATA toll messages that are directly dialed by the subscriber. NTELOS' limited intraLATA toll service does not include any mechanisms for use of access codes or dial-around codes at payphones, thus NTELOS does not carry any compensable calls. Attached to this petition is an affidavit from Mary McDermott, Senior Vice President, which states that NTELOS does not carry compensable calls. All compensable calls originating from payphones within the NTELOS service area are passed on to other carriers who pay interstate or intrastate, as the case may be, originating access charges. Any compensable calls terminated by NTELOS within its service area are received from other carriers who pay interstate or intrastate, as the case may be, terminating access charges. Thus, NTELOS does not carry individual compensable calls that both originate and terminate within NTELOS' LEC service area or are carried by NTELOS as an IXC that are subject to compensation under the criteria established in the *Fifth Reconsideration Order* for either a LEC or an IXC.⁷ Any compensable call terminating in NTELOS' service area would have to be an IXC-carried call.⁸ Assuming that NTELOS handles compensable calls and requiring it to pay for compensable calls that it never handles is not a fair compensation mechanism.

4. The *Fifth Reconsideration Order* provides a mechanism for entities to be removed from the allocation percentage appendices.

Appendices A, B and C of the *Fifth Reconsideration Order* list "carrier" allocation percentages for default compensation factors for, respectively, interim access code and subscriber 800 calls (November 7, 1996 through October 6, 1997), intermediate access code and subscriber 800 calls (October 7, 1997 through April 20, 1999) and post-intermediate access code and subscriber 800 calls (April 21, 1999 forward). In the *Fifth Reconsideration Order*, the Commission noted that entities listed on Appendices A, B, or C could file a petition for a waiver with the Wireline Competition Bureau – such as the instant waiver request – for exclusion from the Commission's allocation. Note 89 states:

⁶ *Id.*, at 3.

⁷ *Fifth Reconsideration Order*, at 55.

⁸ NTELOS' affiliate, NTELOS Network Inc. (f/k/a CFW Network Inc.) is an IXC providing long distance service as a reseller. NTELOS Network is included on Appendice B of the *Fifth Reconsideration Order*. As a carrier included on Appendice B, NTELOS Network is subject to default payphone compensation.

... Any entity named in our allocation that then receives a request for per payphone compensation from a PSP or other entity may, within ninety (90) days of receiving such a request, file a waiver request with the Wireline Competition Bureau for exclusion from our allocation, with a demonstration that the entity provides no communications service to others.

As has been demonstrated above, while NTELOS provides communications services, it never provides compensable communications service to others and is a non-carrier as defined by the *Fifth Reconsideration Order*.⁹ Accordingly, NTELOS requests within 90 days of receipt of its only request for compensation, that from APCC, that it be removed from the Commission's allocation appendices.

5. NTELOS' petition for waiver meets the Commission's standards for granting a waiver of its rules.

Under Section 1.3 of the Commission's Rules, any provision of the rules may be waived if "good cause" is shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.¹⁰ Payment of payphone compensation by NTELOS absent compensable calls that both originate and terminate within NTELOS' network, whereby NTELOS does not collect any revenue for the call, apart from revenue under the applicable interstate or intrastate access charge regime, would be inconsistent with the public interest. Additionally, payment of compensation under such circumstances would undermine the policy that entities benefiting from the carrying of compensable payphone originating calls should pay compensation to payphone providers. Moreover, it would be burdensome and inequitable for NTELOS and, in turn, its customers to bear the cost of default payment compensation when NTELOS carries no compensable calls.¹¹

CONCLUSION

For the foregoing reasons, NTELOS respectfully requests that the Commission waive Sections 64.1301(a), 64.1301(d) and 64.1301(e) and thereby not include NTELOS among the entities listed on Appendices A, B and C of the *Fifth Reconsideration Order* required to pay default compensation to payphone service providers. The requested waiver will serve the public interest by allowing NTELOS to avoid payment of charges for which no related benefit accrues to NTELOS given that NTELOS does not carry payphone originated compensable calls.

⁹ *Fifth Reconsideration Order*, Note 3.

¹⁰ *Wait Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) ("WAIT Radio"); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹¹ *See Wait Radio*, 418 F.2d at 1159. The petitioner must demonstrate, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest.

Respectfully Submitted.

/s/ Mary McDermott

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